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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1053

THE FIRESTONE TIRE & RUBBER COMPANY, *Petitioner,*

v.

THE GENERAL TIRE & RUBBER COMPANY and THE HONORABLE R. DORSEY WATKINS, United States District Judge for the District of Maryland,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Firestone Tire & Rubber Company, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit issuing a writ of mandamus directing transfer of Civil Action 12,932, in the midst of trial, from the District of Maryland to the Northern District of Ohio.

OPINIONS BELOW

The *en banc* opinion of the Court of Appeals, not yet officially reported, is reprinted in Appendix A, *infra,* p. 1a. The opinion of the District Court for the District of Maryland has not been reported, but is reprinted in Appendix B, *infra,* p. 22a.

JURISDICTION

The *en banc* order of the Court of Appeals (Appendix A, *infra,* p. 19a), directing Judge Watkins of the District Court for the District of Maryland "to enter an order directing the transfer of the said civil action to the said District Court for the Northern District of Ohio," was entered on January 12, 1967, one day following the filing of its opinion in this case. This petiton for a writ of certiorari was filed within 90 days of the entry of that order. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether, in the midst of trial of a civil action, a federal court of appeals has the power under 28 U.S.C. § 1651 to disregard the sole ground for transfer urged before the trial judge and the appellate court, *sua sponte* substitute a new ground of its own choice and, on a *de novo* determination of the applicability of such new ground in view of facts largely not of record, issue a writ of mandamus ordering transfer.

2. Whether 28 U.S.C. § 1404(a) empowers the transfer of a civil action, primarily in the interest of "effective administration and supervision of the courts of our circuit", in circumstances where (a) the trial of the action has been underway for over two and a half years, (b) a massive record has been compiled at great expense to the parties and with a great expenditure of the time and talents of the trial judge, (c) many of the key witnesses after testifying in the case are now dead or otherwise unavailable for further testimony, and (d) the transfer would likely necessitate a retrial of the entire case, in the absence of the

now unavailable witnesses, thereby wasting all the testimony, exhibits, energies, time and expenses devoted to the case prior to transfer.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1404(a), Change of Venue:

For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

28 U.S.C. § 1651(a), the All Writs Statute:

The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

STATEMENT OF THE CASE

Late in the afternoon of January 11, 1967, while the trial was in progress with a witness on the stand, the Fourth Circuit Court of Appeals advised District Judge Watkins by telephone of its writ of mandamus directing "transfer" of Civil Action 12,932 from the District of Maryland to the Northern District of Ohio. Trial proceedings which began almost three years before, on April 15, 1964, abruptly terminated at page 38,299 of the record.

It is that action of the Fourth Circuit which this petition presents for review.

Civil Action 12,932 is a long and complex patent case, three aspects of which have earlier been the subject of unsuccessful mandamus proceedings instituted by Respondent General Tire and Rubber Company

resulting in certiorari petitions in this Court. But the facts relevant to the questions here presented may be quickly stated.

Civil Action 12,932 was filed in the Maryland District Court on March 30, 1961, by The Firestone Tire & Rubber Company and McCreary Tire & Rubber Company seeking a declaration that United States patent 2,964,083, owned by the General Tire & Rubber Company is invalid and not infringed. The declaratory judgment action was precipitated by General's threats to institute infringement litigation against Firestone and McCreary after infringement suits were brought by General in Ohio against Goodyear Tire & Rubber Company and U. S. Rubber Company on December 13, 1960, the day the patent issued.[1]

A pretrial motion by defendant General to transfer Civil Action 12,932 from Maryland to Ohio was filed April 13, 1961 and denied by Judge Watkins on July 6, 1961. As he later explained it, the denial was based on the finding that "the District of Maryland seemed to be the forum conveniens."[2] No appellate review was sought.

On September 6, 1963, General renewed its motion to transfer, alleging a change in conditions as to the convenience of the parties and witnesses and empha-

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[1] McCreary, acting wholly independently of Firestone, settled its Maryland litigation with General on July 18, 1966.

In Cleveland, Goodyear Tire and Rubber Company settled with General on February 9, 1966, while the third mandamus arising out of Civil Action 12,932 was pending before the Fourth Circuit.

[2] The quotation is from the opinion of Judge Watkins denying the renewed transfer motion on October 14, 1963 included in the record certified to this Court in No. 878, O.T. 1964.

sizing the "judicial economy" of a single trial in Ohio. Judge Watkins denied the renewed motion on October 14, 1963, stating that he was "completely unconvinced that a transfer would really conserve judicial manpower." He added that apparently the Baltimore case "set firmly for trial on January 7, 1964 in this court will be reached, and (hopefully) will be decided before the Cleveland cases, which *may* be set for trial in April 1964, if the parties are then ready for trial." [3]

General thereupon brought a mandamus action in the Fourth Circuit to compel Judge Watkins to transfer the case to Cleveland, pursuant to the transfer statute, 28 U.S.C. § 1404(a). The Fourth Circuit denied the petition for mandamus *solely* on the following grounds (*General Tire & Rubber Company* v. *Watkins*, 326 F. 2d 926, 929):

> " . . . Reserving the question as to under exactly what circumstances this court would issue a mandamus to compel a transfer, *Cf.* Morehead v. Barksdale, 263 F. 2d 117 (4 Cir. 1959), we have no hesitation in saying that on the state of this record we will not issue a mandamus here. There is no evidence that the Ohio cases can be reached at a definite time in the future, whereas this case is set for a firm date early next year. The court is thoroughly familiar with the issues. More than 25,000 pages of depositions and 18,000 pages of exhibits are in the record. Plaintiffs have been required to answer over 600 interrogatories. This work has proceeded under ground rules laid down by the district judge [Judge Watkins], who in ten full days of hearing must have acquired familiarity with the details

[3] The quotation is from the opinion of Judge Watkins denying the renewed transfer motion on October 14, 1963 included in the record certified to this Court in No. 878, O.T. 1964.

of the case. Under these circumstances the petition will be Denied."[4]

Thereafter, on April 20, 1964, this Court denied General's petition for certiorari to review this action by the Fourth Circuit. 377 U.S. 909.

Following a belated attempt by General to secure a jury trial,[5] the actual trial of the declaratory judgment action commenced before Judge Watkins in Baltimore on April 15, 1964, and continued thereafter on a four-day-per-week schedule.

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[4] In refusing mandamus in 1964 *before* the trial had even started, the appellate court joined Judge Watkins in rejecting as a ground for transfer the very "convenience" and "forum shopping" arguments which it has now found significant after almost three years of trial. See Appendix A, *infra*, p. 17a.

As a *nunc pro tunc* prerequisite to its *de novo* determination that

> ". . . the subsequent settlement with McCreary on July 18, 1966, further strengthens the case for transfer at this time." (Appendix A, *infra*, p. 14a)

the Fourth Circuit, in the 1967 opinion, stated that its January 1964 decision denying transfer

> ". . . was premised upon two principal factors: (1) that McCreary Tire and Rubber Company, the customer of Firestone, was an independent coequal party plaintiff against whom alone a patent suit could not be brought in Ohio for reasons of venue . . ." (Appendix A, *infra*, pp. 2a-3a)

But the 1964 opinion denying transfer is exclusively posited on other grounds.

[5] Judge Watkins' denial of the jury trial request led to a second mandamus proceeding in the Fourth Circuit. On March 31, 1964, the Fourth Circuit denied General's petition for mandamus and affirmed the refusal to grant a jury trial. *General Tire & Rubber Company* v. *Watkins*, 331 F. 2d 192. Certiorari was denied on June 1, 1964 by this Court. 377 U.S. 952.

Nearly two years later, the trial having proceeded without interruption save for occasional recesses, General filed a third mandamus action in the Fourth Circuit seeking an order disqualifying Judge Watkins from further participation in the case by virtue of 28 U.S.C. § 455—concededly a further step in General's crusade "to have this case in one way or another consolidated with the Cleveland case and tried there".[6] In dismissing the petition and finding no impropriety whatever on Judge Watkins' part,[7] the Fourth Circuit commented (*General Tire & Rubber Company* v. *Watkins,* 363 F. 2d 87, 88):

> "The patent case finally came on for trial in the [Baltimore] District Court on April 15, 1964. Between that date and February 7, 1966, when the present application to disqualify the judge came on for oral argument in this court, the District Court had spent approximately four days per week in hearings; the transcript had grown to over 27,000 pages, including over 1500 exhibits; several key witnesses had died, and it was questionable whether several other witnesses would still be available."

Thereafter, in acceptance of the Fourth Circuit's suggestion (363 F. 2d at 89-90) that any claim of fraud in the inducement of the denials of the prior transfer motions should first be presented to the District Court, General, on June 28, 1966, filed in the Dis-

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[6] The quotation is from remarks of Mr. Merriam, counsel for General, made November 18, 1965 when the first steps to precipitate the third or "disqualification" mandamus were taken. It appears at page 25,806 of the trial record and at page 97 of the "Appendix to Brief of Intervenor" below.

[7] This Court denied certiorari on October 17, 1966 with respect to the Fourth Circuit's dismissal of the third mandamus motion. 385 U.S. 899.

trict Court a "Renewed Motion to Transfer and Motion for Imposition of Sanctions and Assessment of Attorney Fees and Expenses". The sole premise of this renewed motion was the charge that certain fraudulent misrepresentations had been made by Firestone and McCreary which had misled Judge Watkins in connection with his denial of the earlier transfer motions. No claim was made and no evidence was offered that there had been any change in circumstances respecting the convenience of parties or witnesses or the interest of justice which would dictate any different disposition now of the transfer motion. Transfer, in short, was sought solely as a sanction for the alleged fraud and misrepresentation which General charged had earlier been practiced on the trial court.

"In a long and meticulous memorandum opinion filed . . . on October 17, 1966 . . . [Appendix B, *infra*, pp. 22a-42a] [Judge Watkins] reviewed the evidence concerning General's charges and found with Firestone on all points." See Appendix A, *infra*, p. 13a. He specifically found that no fraud had been practiced on the court and that no efforts to practice fraud had been made.[8]

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[8] At the conclusion of his opinion, Judge Watkins made six "general and ultimate" "Findings of Fact", including the following:

> "1. McCreary was an independent party throughout the entire period herein involved and still is an independent party.
>
> "2. McCreary agreed to and in fact did bear its proportionate share of the cost of litigation.
>
> * * * * * * *
>
> "5. No fraud, serious or otherwise, has been practiced upon the Court by the plaintiffs.
>
> "6. There has been no effort by plaintiffs to practice fraud upon the Court."

General immediately filed a fourth mandamus petition in the Fourth Circuit—this one seeking to obtain an order directing Judge Watkins to dismiss the complaint or to transfer the action to the Northern District of Ohio. The entire petition concerned itself with the alleged fraud and misrepresentation, detailing General's contentions that the District Court had been deceived by Firestone.[9] The only reference to the requested transfer in the body of the petition was as an alternative sanction for the fraud, should the Fourth Circuit overrule Judge Watkins' findings and determine for itself that fraud had in fact been practiced. As stated at page 18 of the petition:

> "If this Court finds that a fraud has been practiced on the District Court, the next question is whether this entitled General Tire to the relief requested. . . . General's contention is that under

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On the basis of these findings, Judge Watkins concluded as a matter of law:

> "3. The renewed motions of April 13, 1961 to dismiss or transfer, of September 6, 1963 to transfer, and the motion for the imposition of sanctions, are each and all without merit, and should be and are denied." (Appendix B, *infra*, pp. 41a-42a).

[9] The "Questions Presented" by the petition filed in the Fourth Circuit were three in number:

> "1. Whether the representations made by Firestone to the District Court, which representations are set out at pages 5 to 8 of this brief, when considered in view of the telephone transcript of May 9, 1961, constituted a fraud practiced or attempted upon the District Court.
>
> "2. Whether, if such fraud has been practiced upon the District Court, General Tire is entitled in law and equity to have Civil Action 12,932 dismissed or transferred to Ohio.
>
> "3. Whether General Tire is entitled to an assessment against Firestone for its attorneys fees and expenses incurred in prosecuting Civil Action 12,932."

> the doctrine of *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238 (1944), it is clearly entitled to the relief asked for in its original transfer motion. That is, either the declaratory judgment complaint should be dismissed or the counterclaim should be transferred to Ohio, or both. Whatever the means, it is clear that the judgment denying transfer must be 'devitalized.' See *Hazel-Atlas*, at 245."

No facts were alleged, no claim or argument was made, to the effect that "the convenience of parties and witnesses, in the interest of justice," as mentioned in 28 U.S.C. § 1404(a), dictated a transfer of the declaratory judgment case long after the trial thereof had commenced. Transfer, in short, was sought solely as an alternative penalty for the alleged fraud.

The Fourth Circuit, sitting *en banc*, set forth in detail the facts that General alleged to be indicative of the fraud. But the court then stated that "We do not feel it advisable at this stage of the lawsuit to pass on the district court's findings and conclusions with respect to General's contentions of bad faith and misrepresentation to the court. . . . we think that their resolution in favor of Firestone should not have been determinative of the motion to transfer. Indeed we think the court's preoccupation therewith caused it to overlook completely the factor which should have controlled the decision. That factor was the complete change of conditions which had taken place since the motion was originally denied. This failure resulted in an order which constituted an abuse of discretion." Appendix A, *infra*, pp. 13a-14a.

The Fourth Circuit then proceeded to elaborate upon the "change of conditions" which warranted a trans-

fer to the Northern District of Ohio. Disregarding General's sole claim that transfer was required as an alternative sanction for the alleged fraud, the court ruled that its concern with "the effective administration and supervision of the courts of our circuit" made the transfer mandatory. None of the factors found controlling by the court, however, had been the subject of any evidence, claim or argument by any of the parties in the mandamus proceeding.

The Fourth Circuit's opinion "reversed" the order of the District Court, and on the following day there was entered a formal order granting the petition for a writ of mandamus and ordering and directing Judge Watkins to vacate his order of September 26, 1966, denying the renewed motion to transfer or in the alternative to dismiss the suit and "to enter an order directing the transfer of the said civil action to the said District Court for the Northern District of Ohio". Appendix A, *infra,* p. 19a. This order was by its terms conditioned upon the Fourth Circuit's own unanimous opinion "that the case should be transferred to the United States District Court for the Northern District of Ohio, Eastern Division."

REASONS FOR GRANTING THE WRIT

The decision below presents questions of extraordinary significance in the administration of the federal court system. Basically at stake is the reincarnation of a problem which should have been put to rest by this Court in *Platt* v. *Minnesota Mining & Mfg. Co.,* 376 U.S. 240—*i.e.,* whether a federal appellate court is empowered to make its own *de novo* examination of the factors relevant to the transfer of a case from one federal district court to another and thereupon to order

the transfer on the basis of a factor not urged before or considered by the trial judge.

Here the Fourth Circuit has sought to exercise the very transfer power which the *Platt* decision held to be beyond its jurisdictional ambit. And it has done so in a manner and under circumstances creating far more serious problems for courts and litigants than were involved or foreseen in *Platt*. To order the transfer of a complex federal court trial, more than two and a half years after its commencement, is to bring into question a host of practical and policy considerations under the transfer statute, 28 U.S.C. § 1404(a). And when the transfer is ordered upon the basis of "effective administration and supervision of the courts of our circuit," a basis never considered by the trial court nor urged upon the appellate court, elemental questions of procedural fairness and abuse of appellate power under the All Writs Statute, 28 U.S.C. § 1651(a), are brought into being.

The combination of the many and varied problems arising from the Fourth Circuit's patent disregard of the *Platt* ruling is such as to raise the ultimate question whether the Fourth Circuit's departure from the accepted and usual course of appellate proceedings justifies the summary and swift exercise of this Court's power of supervision and correction. The "effective administration and supervision of the courts of . . . [the Fourth] circuit" may well demand an immediate resumption of the instant trial in Baltimore.

1. The Fourth Circuit's Order Directing the Transfer of This Case to the Northern District of Ohio Is in Complete Conflict With This Court's Decision in Platt v. Minnesota Mining & Mfg. Co., 376 U.S. 240

In *Platt* v. *Minnesota Mining & Mfg. Co.*, 376 U.S. 240, this Court unanimously ruled that a federal court of appeals has no power to utilize a writ of mandamus to order the transfer of a multi-venue criminal prosecution from one district to another based upon the appellate court's own *de novo* examination of the record. Rule 21(b) of the Federal Rules of Criminal Procedure, the Court noted, committed to the trial judge the discretionary function of ordering such a transfer based upon an assessment of the appropriate criteria. "The function of the Court of Appeals in this case was to determine the appropriate criteria and then leave their application to the trial judge on remand . . ." 376 U.S. at 245. Here, however, the court of appeals disregarded the sole ground for transfer urged before it and the trial judge, *sua sponte* substituted a new and largely unsupported ground of its own choice, and on a *de novo* determination of the applicability of such new ground exercised the discretionary function which the statute commits in the first instance to the district court by issuing a writ of mandamus ordering transfer in the midst of trial.

In this case and without citing or attempting to distinguish the *Platt* decision, the Fourth Circuit has undertaken to do precisely what the *Platt* case determined it could not do. After finding abuse of discretion consequent from failure of the district court

to consider and rest its decision upon a ground never urged before it—the new ground being an alleged "complete change of conditions which have taken place since the [transfer] motion was originally denied"—the Fourth Circuit proceeded to formulate a new criterion for transfer—"the effective administration and supervision of the courts of our circuit." But instead of remanding the matter to the District Court to consider the advisability of ordering a transfer in light of the new criterion, as *Platt* requires, the Fourth Circuit made its own *de novo* factual determinations and made its own conclusion that a transfer was necessary in terms of the new criterion and on the basis of "facts" of its own choice largely unsupported by the record.

It is the Fourth Circuit on its own motion, not the District Court for the District of Maryland, that has determined that the changed circumstances of the Maryland and Ohio lawsuits and the conveniences of the parties and witnesses are such as to make the transfer essential as a matter of proper judicial administration.

Thus the action here taken by the Fourth Circuit is completely inconsistent with *Platt*, and outside the scope of appellate power as defined by this Court in the *Platt* case. And the inconsistently with *Platt* is nonetheless total by virtue of the fact that the instant case involves the transfer of a civil action, in contrast to the criminal action sought to be transferred in *Platt*. Like Rule 21(b) of the Federal Rules of Criminal Procedure with respect to the transfer of multivenue prosecutions, 28 U.S.C. § 1404(a) commits to the trial judge the discretionary function of determining when to transfer "any civil action" in

the light of appropriate criteria.[10] The restrictions on the appellate function with respect to such transfers, as defined in *Platt,* would plainly be the same in both the criminal and the civil context.

The grant of certiorari is therefore appropriate to give effect to the controlling impact of the *Platt* case. There is an obvious need for this Court to make clear that the *Platt* limitations on the appellate function apply to civil as well as criminal transfer matters.[11]

2. The Fourth Circuit's Issuance of a Writ of Mandamus on Grounds Not Advanced or Argued Before It and Not Considered by the Trial Court Raises Serious Problems Under the All Writs Statute, 28 U.S.C. § 1651(a)

In purporting to exercise its broad power under the All Writs Statute, 28 U.S.C. § 1651(a), to issue a writ of mandamus, the Fourth Circuit has created several important problems under that statute which deserve the attention and consideration of this Court.

Basically, the Fourth Circuit had before it a petition for a writ of mandamus to compel Judge Watkins to

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[10] Rule 21(b) provides that the "court upon motion of the defendant shall transfer the proceeding as to him to another district or division . . . if the court is satisfied that in the interest of justice the proceeding should be transferred . . ."

Under 28 U.S.C. § 1404(a), "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

[11] The instant case presents none of the "extraordinary circumstances" which were present in *Koehring Co.* v. *Hyde Constr. Co.,* 382 U.S. 362, and which led this Court to rule that § 1404(a) does not preclude "an appellate court, where unusual circumstances indicate the necessity thereof, from effecting a transfer by direct order." The unusual circumstances in *Koehring* involved the refusal of a district court to comply with an earlier mandate of the Fifth Circuit to transfer the case.

impose sanctions upon the petitioner for having committed an alleged fraud upon the trial court at the time of the denial of the earlier, pretrial transfer motions. The question as to this alleged fraud had also been the focal point of the proceedings before Judge Watkins which led to the mandamus effort. And his findings that no such fraud had even been attempted became the subject matter of the mandamus petition in the Fourth Circuit. The mandamus effort, in short, sought a reversal of Judge Watkins' findings as to the absence of any fraud. As the mandamus petition itself stated (page 18), only if the Fourth Circuit should itself then find "that a fraud has been practiced on the District Court" would it become pertinent to determine the kind of relief necessary to devitalize the fraud. The relief requested was either a dismissal of the declaratory judgment action or the transfer of the proceedings to Cleveland.

In granting the petition for writ of mandamus, the Fourth Circuit refused to consider two vital factors before it: (a) after detailing at length the allegations of fraud, the Fourth Circuit stated that it was not "advisable at this stage in the lawsuit to pass on the district court's findings and conclusions with respect to General's contentions of bad faith and misrepresentation to the court"; and (b) the Fourth Circuit ignored petitioner Firestone's motion to dismiss the mandamus petition on the ground that findings as to fraud cannot be reviewed by the extraordinary writ of mandamus. See *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249, 255; *Parr* v. *United States*, 351 U.S. 513, 520. Instead, the Fourth Circuit seized upon one of the alternative sanctions suggested had the fraud findings been reversed, the sanction of transferring the case to

Ohio. It then proceeded outside the lawful exercise of its prescribed jurisdiction to convert the mandamus petition into a vehicle for a full-scale *de novo* consideration of transferring the case in the interest of the "effective administration and supervision of the courts of our circuit."

One result of this *sua sponte,* unanticipated usurpation of judicial power was to deprive all parties before the Fourth Circuit of the opportunity to present and to evaluate the facts and considerations relevant to the transfer order entered by the Fourth Circuit.

In *Swindell-Dressler Corporation* v. *Dumbauld,* 308 F. 2d 267 (C.A. 3), with which the decision below conflicts in principle, the Third Circuit flatly rejected an analogous usurpation of prerogative by the trial judge, stating:

> "But quite aside from the foregoing, no notice, hearing or opportunity to be heard as to transfer under Section 1404(a) was afforded Swindell prior to the order of transfer of December 14, 1961. In denying Swindell any hearing or opportunity for hearing the court below denied it procedural due process of law guaranteed to it by the Fifth Amendment. . . . The plain and unsubtle fact which is paramount here is that there was no notice or hearing before the order of December 14, 1961, purporting to effect the transfer . . . was entered." 308 F. 2d 267, 273-274.

Likewise in this case, "the plain and unsubtle fact which is paramount" is that there was no notice or hearing with respect to the grounds on which the mandamus was based before the writ commanding trans-

fer was filed by the Fourth Circuit on January 12, 1967.[12]

In this case, where their arguments were necessarily confined to the challenge to the trial court's findings that there had been no fraud, the parties had no occasion or notice to submit facts and arguments directed to any change in the trial conditions since the denial of the original transfer motions. No opportunity was afforded the parties to comment upon the promulgation of the new standard under § 1404(a) relative to the effective administration of courts within the Fourth Circuit or to present any facts relevant thereto. Not even Judge Watkins ever had an opportunity to consider or resolve the matters that became decisive in the issuance of the mandamus writ.

Among matters considered *de novo* in the opinion below, concerning which neither the parties nor the trial judge were given notice or opportunity to be heard, are the following: (1) the alleged March 1, 1967 trial date for the U. S. Rubber case in Ohio;[13] (2) the findings as to "convenience" with respect to the Ohio locale of the corporate parties and of the docu-

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[12] On or about January 16, 1967, Intervenor Firestone sought a stay of execution of the writ of mandamus "for thirty days in order that the Intervenor may have an opportunity to prepare and file in the Supreme Court of the United States a Petition for a Writ of Certiorari, a Petition for a Writ of *Mandamus*, or both . . .". The Court of Appeals granted the stay *only* to ". . . apply to the Supreme Court of the United States for a writ of *certiorari* to this Court." (Appendix A, *infra*, p. 21a).

[13] While the March 1 trial date is referred to in the "Petitioner's Reply Brief" and was mentioned on the trial record prior to the mandamus proceeding, it was never urged as a ground for transfer.

ments and witnesses, as to which it is said "Firestone has made no serious argument to the contrary", and the findings as to forum shopping;[14] (3) the findings that the Cleveland forum is "equally convenient", that Maryland "no longer" offers "any convenience" to Firestone, and that the rights of Firestone as a private party "in any event will not be impaired in the least by transfer";[15] (4) the finding that General's Ohio case against U. S. Rubber cannot be moved to Mary-

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[14] See discussion of these appellate findings in footnote 21, p. 25, *infra*. These are the very findings which were rejected by Judge Watkins in his denial of the original and renewed transfer motions on July 6, 1961 and October 14, 1963. These same arguments were rejected by the Court of Appeals in its opinion on the transfer mandamus, 326 F. 2d 926 at 929. They were not again raised when the transfer motions were renewed on June 28, 1966 on the ground of fraud. Firestone "made no serious argument to the contrary" because it was never given an opportunity to do so.

[15] These findings totally overlook the necessity to retry the entire case in the Ohio court or, alternatively, to impose upon the Ohio judge the impossible task of familiarizing himself with two and one-half years of trial record and three years of pretrial proceedings. As the opinion below tacitly concedes, the practical effect of mandamus is dismissal—not transfer. Firestone has an unquestioned right to a fair hearing, the preservation of the Baltimore record and a disposition of its case by Judge Watkins before whom that record was made—a right which is obviously impaired by the transfer order. Yet this clearly erroneous "finding" was essential to the court's futile attempt to distinguish the directly conflicting decision of the First Circuit in *In re Josephson*, 218 F. 2d 174 (C.A. 1), Appendix A, *infra*, p. 18a.

land—a finding inconsistent with the record;[16] and (5) the unsupported presumptions as to consolidation of the Firestone case with the U. S. Rubber case in Cleveland.

The inevitable consequence of the Fourth Circuit's *sua sponte* direction to transfer this case to Ohio was to deprive the parties of a fair hearing on that issue and to force this Court to become the only tribunal capable of providing some form of review of the basic findings as to the advisability of transfer. Such action creates most serious problems as to the fair exercise of appellate power under § 1651(a). And such action further underscores the wisdom of this Court's admonition in the *Platt* case that courts of appeals should not attempt to act *de novo* on transfer matters. Appellate courts are not equipped to treat with such matters in the first instance, gathering the evidence and performing the discretionary function which Congress has given to the trial courts. In the exercise of this Court's supervisory power over the administration of justice in the federal court system, the decision below should be reviewed and the *sua sponte* transfer command of the Fourth Circuit vacated.

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[16] In its decision on the second (jury trial) mandamus, 331 F. 2d 192, the Fourth Circuit itself referred to the fact that U.S. Rubber in May of 1964 affirmatively moved in Ohio to transfer that litigation to Baltimore. The transfer motion made it clear that the venue prerequisites of 28 U.S.C. 1400(b) were satisfied in Maryland as to U. S. Rubber such that the contemplated transfer could be effected. Papers relevant to the U. S. Rubber transfer motion are attached to the "Application for Stay of the Trial of Civil Action 12,932 in the District of Maryland" addressed by General to the Chief Justice on April 1, 1964, incident to No. 878, O.T. 1964. As these papers reflect, the motion to transfer was withdrawn because Judge Watkins determined that consolidation in Maryland would be infeasible, even before the trial began, in view of the wide disparity in the state of trial preparation between the two cases.

3. The Fourth Circuit's Direction That This Case Be Transferred in the Midst of a Long and Complex Trial Is Inconsistent With the Policy and Purpose of 28 U.S.C. § 1404(a)

This Court's review of the action below is further warranted by virtue of the important and novel problems arising out of the Fourth Circuit's command that this case be transferred almost three years after commencement of trial.

Quite aside from the question whether, under the circumstances here present, a court of appeals can itself direct a transfer, a significant question is here posed whether 28 U.S.C. § 1404(a), which governs the transfer of civil actions, empowers any kind of a transfer after a trial has progressed as far as this one has. While the language of § 1404(a) sets no time limit on when a transfer may be made, there appears to be no recorded instance prior to the command below where a federal civil action was ordered transferred after the commencement and prior to the completion of a trial.[17]

Indeed, the entire thrust of § 1404(a) is directed at transfers prior to the commencement of the trial of a case. The Congressional standard of weighing "the convenience of parties and witnesses, in the interest of justice," as a basis for resolving transfer motions, is one that makes sense only when applied prospectively. A court can intelligently weigh the relative conveniences and interests as between two possible trial sites only prior to the commencement of trial.

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[17] There are three federal court decisions dealing with transfers after a trial has been concluded, but the transfers were all in connection with a subsequent retrial or new and further proceedings. See *Sypert* v. *Miner*, 266 F. 2d 196 (C.A. 7); *United States* v. *Swift & Co.*, 158 F. Supp. 551 (D.C.D.C.); *Adler* v. *McKee*, 92 F. Supp. 613 (S.D.N.Y.).

Once a trial starts, and witnesses begin to testify, the supposed inconveniences become moot and any error in not having transferred the case becomes harmless, at least in the absence of unusual prejudice to one of the parties. See *Whittier* v. *Emmet,* 281 F. 2d 24, 30-31 (App. D.C.).[18]

Moreover, the longer a trial progresses the greater becomes the sheer waste of the time and energies of the witnesses, the parties and the trial judge upon a transfer in the midst of trial. No more dramatic illustration of such inequitable consequences could be devised than that afforded by this case. To direct the transfer of the Maryland case after three years of pretrial activities and more than two and a half years after the trial itself has been underway means (1) a waste of Judge Watkins' time during the pretrial stages of the litigation and in having presided at this long trial and the loss of all the impressions he has formed of the witnesses and the rulings he has made as to the evidence, including the benefits of certain on-site inspections he has made; (2) a waste of the efforts and inconveniences already undergone by the many witnesses; (3) the complete loss of the testimony of those witnesses who have since died or who are otherwise unavailable for further testimony; (4) the waste entailed in disregarding the thousands of documents painstakingly collected in Baltimore and introduced into the record; and (5) the loss of the attorneys' efforts and time and the waste of the heavy expenses incurred by the liti-

[18] In the *Whittier* case, Mr. Justice Burton, sitting by designation, wrote: "Venue is primarily designed to protect defendants from inconvenient forums and courts from inconvenient lawsuits. Once the case has been heard fully and fairly on the merits, the reasons for reversing the judgment on grounds of improper venue are substantially diminished in the absence of prejudice to a party who has preserved his standing to complain by timely objection." 281 F. 2d at 30.

gants in the creation of the massive pretrial and trial record. And upon the transfer of this case to Cleveland, as the Fourth Circuit has ordered, either the suit would have to be retried or a new judge would be faced with the nigh-impossible task of absorbing a 38,000-page record, with its thousands of exhibits, and recreating the countless impressions already formed by Judge Watkins.[19] To say, as the Fourth Circuit has said, that to send this case to Cleveland and to consolidate it with the pending suit against U. S. Rubber is "the only way in which time and effort can now be saved" is sheer nonsense.

The unsupported presumptions of consolidation which formed the major prop of the Fourth Circuit's projection of judicial economy are pure speculation. As District Judge Wood wrote in *Popkin* v. *Eastern Air Lines*, 253 F. Supp. 244 (E.D. Pa.), refusing transfer following the remand from this Court in *Van Dusen* v. *Barrack*, 376 U.S. 612:

> "We obviously have no power to compel consolidation of these cases with those in Boston. Swindell-Dressler Corp. v. Dumbauld, 308 F. 2d 267, 273 (3 Cir. 1962). This is a matter in the discretion of the District Court of Massachusetts, and we have no indications that it would consolidate. We have no power further to order that

[19] The Fourth Circuit conceded that as "Against the judicial time and effort already spent on the Maryland case must be weighed the fact that the Ohio judge either has been, or will have to be, 'educated' in much of the same factual background whether or not the Ohio case against Firestone can be consolidated with its companion case against U. S. Rubber." (Appendix A, *infra*, p. 14a). But the weight of that balance would seem clearly on the side of preserving "the judicial time and effort already spent on the Maryland case." If the patent is invalid in Maryland, General would have no right to a second trial in Ohio in any event. *Nickerson* v. *Pep Boys—Manny, Moe and Jack*, 247 F. Supp. 221 (D. Del. 1965).

District how to try these cases. . . . " 253 F. Supp. 244, 249.

Should consolidation prove impossible or should the judge of the Northern District of Ohio refuse to order or permit consolidation, the premise of "judicial economy" upon which the decision below is posited totally fails. Nor is the result materially different even if consolidation is permitted. The vast time and effort which would be required for the Ohio judge to absorb, interrelate, and give effect to what has already transpired in Baltimore—even if it could be done—would certainly constitute a useless duplication of effort. And without the hoped-for consolidation the transferred action may well go to the bottom of the Cleveland docket to await a trial call several years hence.

So grievous are these inequities and these litigation wastes as to reinforce an interpretation of § 1404(a) that would prohibit a transfer after a trial has progressed as far as this one has. At this juncture of a case, the Fourth Circuit having acknowledged that the trial will likely come to an end within a matter of a few months, the transfer standards set forth in § 1404(a) lose all their meaningfulness. Thus the criterion of "the convenience of parties and witnesses" is now moot as to the parties themselves[20] and

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[20] Thus the Fourth Circuit's statement that both parties here are Ohio corporations with main offices in that state has no relevance to the fact that these corporations, which are worldwide in their operations, have already participated in the Baltimore trial for the past two and a half years without undue inconvenience or any claim or showing of prejudice. Moreover, the fact that a corporate party has its main office or "home" in a particular state "has no independent significance in determining whether transfer to that district would be 'in the interest of justice,' although it may be considered with reference to such factors as the convenience of records, officers, personnel and counsel." *Platt* v. *Minnesota Mining & Mfg. Co.*, 376 U.S. 240, 245-246.

as to the witnesses who have already testified.[21] The "interest of justice" concept of § 1404(a), in light of the complete waste of all the elements that have gone into the creation of the Baltimore trial record, can scarcely be considered advanced by ordering a transfer at this late date.

The effort of the Fourth Circuit to create a new standard for resolving transfer motions—the interest in the "effective administration and supervision of the courts of our circuit"—accordingly becomes highly questionable in the context of this case and under the standards set forth in § 1404(a). What administrative concern of the Fourth Circuit, in derogation of the convenience of parties and witnesses and the interest of justice, justifies the destruction of a two-and-a-half-year trial record and the imposition on the Sixth Circuit of the responsibility for picking up the shattered remains? If the Fourth Circuit is dissatisfied with the progress or speed of the instant trial, what administrative concern permits the impact of that dissatisfaction to fall upon the parties to the litigation by forcing them to start all over in another tribunal? And the Fourth Circuit's apparent disapproval of petitioner's so-called

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[21] The Fourth Circuit's further remark that "many if not most of the documents and witnesses" are in Ohio disregards the following facts: (a) virtually all of the existing documents known to be present are now and for many months have been physically present in Baltimore in offices rented by the parties for the duration of the trial; (b) over 2,200 of these documents have already been introduced into the record, albeit approximately 1100 are marked only for identification pending rulings by Judge Watkins on their admissibility into evidence; (c) these marked documents are now physically stored in the federal court building in Baltimore; and (d) large numbers of the witnesses have already testified in Baltimore and but three of the remaining 17 witnesses which Firestone intends to call actually reside in Ohio.

"forum shopping"—an argument flatly rejected prior to trial by Judge Watkins and the appellate court alike—seems irrelevant after the trial has been underway over two and a half years and is nearing completion; indeed, to permit or direct a transfer at this stage is to encourage "forum shopping" by the dissatisfied litigant who feels unhappy with the trial judge or the progress of the trial itself.[22]

All of these problems are of more than ordinary significance in the interpretation and application of § 1404(a). If allowed to stand unchallenged and unreviewed, the Fourth Circuit's decision will constitute a most dangerous and unsatisfactory precedent for further efforts to disrupt federal court trials by those litigants and judges who become displeased with the speed or the progress of a given proceeding. This Court should determine the efficacy of such efforts in the light of the specific commands of Congress in § 1404(a).

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[22] State courts have uniformly rejected efforts to transfer a case after commencement of trial on grounds that the trial judge is biased and prejudiced, grounds that usually entitle a litigant to a change of venue as a matter of right. Denial of such efforts is grounded on the theory of precluding "counsel from first ascertaining the attitude of the trial judge on a hearing relating to some of the issues in the case and then, if the court's judgment should not be in harmony with counsel's theory, asserting the prejudice of the court as ground for allowing a change of venue." *Roherty* v. *Green*, 57 Ill. App. 2d 362, 206 N.E. 2d 756, 759. See also *Easter* v. *Dundalk Holding Co.*, 233 Md. 174, 195 A. 2d 682, 685; *State* v. *Lehman*, 182 Mo. 424, 81 S.W. 1118, 1123; *Anderson* v. *Mammoth Min. Co.*, 26 Utah 357, 73 P. 412.

4. The Fourth Circuit's Use of Mandamus To Review an Alleged Abuse of the District Court's Discretion in Denying Transfer Is in Conflict With the Practice of Other Circuits and Represents an Important and Recurring Appellate Problem

A significant and recurring problem and one that has led to sharp conflict among the circuits is presented by the action of the Fourth Circuit in utilizing the extraordinary writ of mandamus to review the district court's action refusing transfer.

As early as 1959, in its decision in *Morehead* v. *Barksdale,* 263 F. 2d 117, the Fourth Circuit, speaking through Judge Sobeloff, stated:

> ". . . The power of the Courts of Appeals to review unappealable interlocutory orders, by use of mandamus, has been a subject of conflict among the circuits. Where a District Judge has granted or denied transfer of a civil action to another district under 28 U.S.C.A. § 1404(a), some courts have held that they are without jurisdiction to review such an interlocutory order, Clayton v. Warlick, 4 Cir., 1956, 232 F. 2d 699; All States Freight v. Modarelli, 3 Cir., 1952, 196 F. 2d 1010; Great Northern Railway Company v. Hyde, 8 Cir., 1956, 238 F. 2d 852 reargued and reaffirmed, 8 Cir., 1957, 245 F. 2d 537; but others have granted review on the theory that any error in this type of interlocutory order would probably be incorrectible on appeal, Ford Motor Co. v. Ryan, 2 Cir., 1950, 182 F. 2d 329; Wiren v. Laws, 1951, 90 U.S. App. D.C. 105, 194 F. 2d 873; Atlantic Coast Line R. Co. v. Davis, 5 Cir., 1950, 185 F. 2d 766." 263 F. 2d 117, 118.

But any mere listing of conflicting precedent serves only to obscure the total confusion and uncertainty now rampant in the appellate courts.

In its 1967 opinion in this case, the Fourth Circuit *sub silentio* overruled its prior decision in *Clayton* v. *Warlick,* 232 F. 2d 699, cited in *Morehead, supra.*

With somewhat greater candor but equal vacillation, the Eighth Circuit first held, and then reaffirmed, that mandamus did not lie to review a discretionary transfer order. *Great Northern Railway Company* v. *Hyde,* 238 F. 2d 852 (1956), reargued and reaffirmed 245 F. 2d 537 (1957). But in 1965 *Great Northern Railway* was overruled by the *en banc* decision in *McGraw-Edison Co.* v. *Van Pelt,* 350 F. 2d 361.[23]

The present state of the conflict—and the uncertainty concerning the propriety of review of discretionary transfer rulings, whether by interlocutory appeal or by mandamus, is reflected by the detailed 1966 opinion in *A Olinick & Sons* v. *Dempster Brothers, Inc.,* 365 F. 2d 439, in which the Second Circuit stated that it has never overturned a district court's transfer ruling on grounds of abuse of discretion although seemingly reserving the right to do so.

The view that mandamus does not lie to inquire into the district court's discretion in refusing or denying transfer—a view in conflict with the decision below and with the apposite decisions in at least the Second, Sixth and Eighth Circuits—is illustrated by the deci-

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[23] In *Great Northern Railway Company* the Eighth Circuit stated:

> "It is unfortunate that the question of the reviewability of a transfer order under § 1651(a) has not yet been put at rest. The Supreme Court, in Norwood v. Kirkpatrick, 349 U.S. 29, 33, 75 S.Ct. 544, 99 L.Ed. 789, found it unnecessary to determine whether mandamus or prohibition was a proper remedy to test the validity of a transfer order. The instant case squarely presents that question and it would seem to be an appropriate case in which to apply for certiorari." 238 F.2d 852, 857.

sion of the First Circuit in *In re Josephson,* 218 F. 2d 174, 183, of the Third Circuit in *All States Freight* v. *Modarelli,* 196 F. 2d 1010, and of the District of Columbia Circuit in *Loew's Inc. et al.* v. *McGuire,* 205 F. 2d 719.

These conflicting views stem from the fact that traditionally the limited function of a writ of mandamus is "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Roche* v. *Evaporated Milk Association,* 319 U.S. 21, 26. Mandamus cannot be used, this Court has said, "to actually control the decision of the trial court," *Bankers Life and Casualty Co.* v. *Holland,* 346 U.S. 379, 383, or "to compel the court below to decide a matter before it in a particular way," *In re Rice,* 155 U.S. 396, 403. On the other hand, the extreme difficulty of demonstrating after trial that any erroneous exercise of discretion by the trial court with respect to transfer was prejudicial [see *Scott* v. *United States,* 255 F. 2d 18 (C.A. 4); *Blumenfield* v. *United States,* 284 F. 2d 46 (C.A. 8)], has led to the feeling that interlocutory review by way of mandamus may be the only technique for meaningful review. But the difficulty of obtaining review after trial also suggests that such errors in denying transfer are not of sufficient importance to warrant use of the extraordinary writ of mandamus, particularly in view of the availability of review under the Interlocutory Appeals Act, 28 U.S.C. § 1292(b).[24]

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[24] But even as to § 1292(b), "The Courts of Appeals have been far from unanimous in deciding whether § 1292(b) is available to one seeking to review the disposition of a § 1404(a) transfer motion for erroneous evaluation of proper factors. The Fifth Circuit stoutly affirms that it is available, and that mandamus is accordingly inappropriate. . . . The Third and Sixth Circuits just as stoutly hold that it is not available." *A. Olinick & Sons* v. *Dempster Brothers, Inc.,* 365 F. 2d 439, 442 (C.A. 2).

This Court has yet to pass upon this perplexing problem. Without commenting on the propriety of mandamus, the Court has reviewed decisions in § 1404 (a) transfer cases which the courts of appeals have reviewed through exercise of the mandamus power. *Hoffman* v. *Blaski,* 363 U.S. 335; see also *Norwood* v. *Kirkpatrick,* 349 U.S. 29; *Ex parte Collett,* 337 U.S. 55. And in *Van Dusen* v. *Barrack,* 376 U.S. 612, 615, fn. 3, the Court took express note of its prior actions in this respect and declined to consider, under the circumstances there present, the Government's contention that mandamus is an improper mode of review of transfer matters.[25]

It therefore seems appropriate for the Court finally to establish the ground rules for the use of the extraordinary writ of mandamus in the review of transfer actions by district courts. The lower courts have floundered too long without the definitive guidance which only this Court can give.

CONCLUSION

For these various reasons, this petition for a writ of certiorari should be granted. Indeed, the petitioner suggests that consideration be given to the appropriateness of a summary reversal of the mandamus order of the Fourth Circuit. That order so far exceeds the bounds of appellate power as defined in *Platt* v. *Minnesota Mining & Mfg. Co.,* 376 U.S. 240, as to warrant its

[25] In the *Platt* case, the Court noted that the Government did not challenge "the use of the extraordinary writ of mandamus as an appropriate means to review the refusal to transfer. We shall, therefore, not consider those matters here, assuming, without deciding, their validity for the purposes of this case." 376 U.S. at 244.

outright reversal. And only by such summary action by this Court can the Baltimore trial be resumed and concluded in the shortest possible time. The interests of prompt and efficient administration of this trial require its immediate resumption.

Alternatively, petitioner moves that this petition for writ of certiorari be treated as a petition for writ of mandamus and that the Fourth Circuit be directed forthwith to vacate its transfer order as being outside the scope of its appellate power. The Fourth Circuit's action, to borrow Mr. Justice Harlan's concurring words in the *Platt* case, 376 U.S. at 246, "inescapably contravenes accepted principles governing the exercise of appellate jurisdiction." That fact, combined with the gross inequities and inconveniences and waste of judicial time attendant upon a transfer ordered in the midst of a prolonged trial, dictates a drastic and immediate remedy.

Respectfully submitted,

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